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October 6, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

RE: Notice of Ex Parte Meeting Regarding the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; CG Docket No. 02-278

Dear Ms. Dortch:

On October 4, 2016, Justin Wiseman, Director of Loan Administration Policy, Public Policy and Industry Relations at the Mortgage Bankers Association ("MBA"); Nicole Ehrbar, Vice President of Public Policy at Quicken Loans, Inc. ("Quicken Loans"); Rodney J. Abele, III, Senior Counsel - Regulatory Policy at PNC Bank, N.A. ("PNC"); Lauren Campisi of McGlinchey Stafford PLLC, counsel to the MBA; and Jeffrey Shapiro of Peck Madigan Jones, met with Mark Stone, Kurt Schroeder, Josh Zeldis and Kristi Thornton from the Consumer & Governmental Affairs Bureau of the Federal Communications Commission (the "Commission") to discuss MBA's Petition for Exemption, CG Docket No. 02-278 (filed June 16, 2016) (the "Petition").

In the Petition, the MBA respectfully requests that the Commission grant an exemption from the prior express consent requirements of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, for residential mortgage servicing calls to cellular telephone numbers that are not charged to the called party and that do not contain an advertisement or constitute telemarketing.

Mortgage servicing calls help consumers. As we discussed during our meeting, mortgage servicers must communicate with borrowers to fulfill their duties under a host of interweaving federal and state regulations and requirements. These federal and state requirements are detailed in the Petition and the attached materials. These communications help consumers by explaining mortgage servicing transfers, options in the event of damage to the property (whether by fire, flood, earthquake, hurricane or other loss event), and options in the event of a default, among other things. While all of these communications are important, it is now well recognized in the wake of the foreclosure crisis that mortgage servicers must be able to speak to a homeowners as early as possible after a missed payment to protect consumer credit histories, maximize the potential success of available loss mitigation options, and keep families in their homes.

These calls directly benefit borrowers by allowing the mortgage servicer to work with the borrower to, among other things:

- determine the reason for the delinquency and whether the reason is temporary or permanent in nature;
- determine the borrower's current perception of their financial circumstances and ability to repay the debt;
- set payment expectations and educate the borrower on the availability of alternatives to foreclosure;
- provide homeowner counseling information;
- discuss options upon the death of a borrower;
- discuss missing documentation needed to complete a loss mitigation application;
- determine whether the borrower has abandoned or vacated the property; and
- address misconceptions or misinformation about the effect of not making payments and other bad advice from debt relief scams.

Effectively communicating with borrowers who are delinquent on their payment obligations is critical to keeping borrowers in their homes and protecting their credit histories. These benefits are not in dispute. In fact, the overwhelming need to facilitate these communications prompted the Federal Housing Finance Agency ("FHFA") to urge the Commission for an exemption from the TCPA prior express consent requirements for mortgage servicing calls.[1]

The communications that the MBA seeks to exempt are not "robocalls" as that term is commonly understood. The federal and state requirements for mortgage servicers to place outbound calls to borrowers require servicers "to have conversations with them, to ask questions, and to provide responsive information."[2] This is the exact type of communication the MBA seeks

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[1] Comment Letter of the Federal Housing Finance Agency to the Proposed Regulation Implementing the Bipartisan Budget Act of 2015, at p. 2 (June 6, 2016).

[2] Comment Letter of the National Consumer Law Center and Americans for Financial Reform, Center for Responsible Lending, Consumer Action Consumer Federation of America, Consumers Union, Financial Protection Law Center, Legal Services of New Jersey, Indiana Legal Services, Inc., Jacksonville Legal Aid, Inc., National Association of

to facilitate through its Petition – live communications between borrowers and their mortgage servicers that are often required by federal and state regulators.

Unlike these required mortgage servicing calls, "robocalls" are most commonly understood as calls delivering a prerecorded message when there is no live caller with whom to engage in a dialogue. As the Commission is well aware, the TCPA requires prior express consent to initiate a call to a cell phone using an "automatic telephone dialing system" or an artificial or prerecorded voice message. Further, the scope of the "automatic telephone dialing system" definition is broad, and includes equipment that has the "potential capacity" to store or produce telephone numbers to be called and to dial such numbers. In its July 2015 Omnibus Declaratory Ruling, the Commission declined to define the contours of the definition of an "automatic telephone dialing system" providing as an outer bound only that equipment must have more than a mere theoretical potential to satisfy the definition, with the example being a rotary telephone. The result of this broad definition without clear boundaries is a spike in litigation alleging TCPA violations by callers based solely on the alleged use of an "automatic telephone dialing system" without use of any prerecorded message.[3]

Requiring mortgage servicers to use telephone equipment with limited capabilities to ensure that it does not trigger the definition of an "automatic telephone dialing system" does not protect consumers. Rather, these limitations prevent mortgage servicers from employing technology with compliance controls to ensure the accuracy of telephone numbers dialed, limitations on the timing and frequency of outbound call attempts to distinct telephone numbers, removal of telephone numbers from any outbound call attempt and to allow for call monitoring and call recording. All of these compliance controls are designed to protect consumers and ensure compliance with the TCPA and other applicable federal and state requirements.

Use of modern telephone equipment also increases efficiency and the ability of mortgage servicers to reach and then engage in meaningful discussions with borrowers. Also, in our members' experience, more and more borrowers prefer text messages as a means of communication. These types of text messages are used to encourage borrowers to call their

Consumer Advocates, National Association of Consumer Bankruptcy Attorneys, and U.S. PRIG (Collectively "NCLC"), at p. 7.

[3] *See, e.g.*, *Manuel v. NRA Group, LLC*, 2016 WL 4158797 (Aug. 5, 2016); *Estrella v. LTD Fin. Servs., LP*, No. 8:14-cv-2624-T-27AEP, 2015 WL 6742062 (M.D. Fla. Nov. 2, 2015); *Gaza v. LTD Fin. Servs., LP*, No. 8:14-cv-1012-T-30JSS, 2015 WL 5009741 (M.D. Fla. Aug. 24, 2015); *Bates v. Dollar Loan Center, LLC*, 2014 WL 60472 (D. Nev. Jan. 7, 2014); *Nelson v. Santander Consumer USA, Inc.*, 2013 WL 1141009, at *3 (W.D. Wis. March 8, 2013); *Ploch v. FirstSource Advantage, LLC*, 2012 WL 5384876, at *4 (E.D. Mo. Nov. 1, 2012); *Dobbin v. Wells Fargo Auto Finance, Inc.*, 2011 WL 2446566 (N.D. Ill. Jun. 14, 2012); *Mudgett v. Navy Federal Credit Union*, 2012 WL 870758 (E.D. Wis. Mar. 13, 2012).

servicer or to schedule a convenient time for an outbound servicing call. MBA urges the Commission to facilitate these communications through the requested exemption.

Exposing mortgage servicers to uncapped statutory penalties for each call attempt made to a borrower pursuant to federal and state requirements contravenes the demonstrated public policy in favor of these calls. It impedes critical communications, and ultimately, it hurts consumers.

The proposed exemption would not leave mortgage servicing calls unregulated. We explained during our meeting that unlike other industries and types of calls for which the TCPA is the sole source of regulation, the timing, frequency and content of mortgage servicing communications are heavily regulated by multiple federal and state laws, regulations and requirements. For example, the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692a *et seq.*, provides call time restrictions, cease communication rights and other substantive regulation of collections communications. The CFPB is currently revising the FDCPA and is likely to propose even more restrictions on the types or nature of contacts that are cited unfavorably by commenters to this petition. Mortgage servicers are also subject to the broad federal prohibitions against unfair, deceptive, and abusive acts and practices ("UDAAP") and many similar state laws. These protections continue to apply in full when mortgage debt is sold or transferred to any buyer of a mortgage that would seek to contact a borrower. Just as the Commission exercised its authority to provide exemptions for communications that are not heavily regulated like package delivery notifications and certain financial institution and healthcare communications, the record here warrants the proposed exemption.

Further, the MBA suggested the following conditions for each free-to-end-user mortgage servicing call made pursuant to the proposed exemption:

1. voice calls and text messages must state the name and contact information of the mortgage servicer (for voice calls, these disclosures must be made at the beginning of the call);

2. voice calls and text messages must not include any telemarketing, cross-marketing, solicitation, or advertising content;

3. text messages and prerecorded calls must be concise, generally one minute or less in length for prerecorded voice messages and one message of 160 characters or less in length for text messages, unless a longer message is required by other applicable law, regulation or requirement;

4. mortgage servicers must offer within each message an easy means to opt out of future messages, including for telephone calls either an automated, interactive voice and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call or

a toll-free number that the consumer can call to opt out of future calls, and text messages must inform recipients of the ability to opt out by replying "STOP," which will be the exclusive means by which consumers may opt out of such messages; and

5. mortgage servicers must honor opt-out requests promptly.

Any condition imposed on the requested exemption must be consistent with federal and state outbound call requirements and other laws that regulate these communications. This would include any timing and frequency condition, which we explained are unnecessary as other proscriptive federal and state laws regulate these practices. Such conditions also should be sufficiently flexible to allow for the evolution of technology and to anticipate additional changes in the various laws and requirements surrounding outbound contact with mortgage borrowers.

MBA appreciates the Commission's mandate to protect privacy interests and has requested a limited exemption from the prior express consent requirements consistent with other previously granted exemptions. The mortgage servicing calls that would be subject to this exemption help millions of American borrowers. These calls can be necessary to save homeowners from foreclosure or inform them of their options following a natural disaster and thus are just as if not more deserving of an exemption from the prior express consent requirements as calls from package delivery services, healthcare providers, and financial institutions.

Pursuant to Section 1.1206(b) of the Commission's rules, the MBA is filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Sincerely,

McGlinchey Stafford

Lauren Campisi

Lauren E. Campisi

LEC/ec

cc: Mark Stone
Kurt Schroeder
Josh Zeldis
Kristi Thornton